Supreme Court, U.S.
FILED

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Docket No.

IN THE SUPREME COURT
OF THE UNITED STATES

RODNEY G. HAWORTH
Petitioner

v.

OPM
Respondent

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL COURT

PETITION FOR WRIT OF CERTIORARI

RODNEY G. HAWORTH, Pro Se
5896 Countryhill Drive
Cincinnati, Ohio 45233
(513) 922-0804

PETITIONER

JAN M. FOLENA
Commercial Litigation
Branch
Civil Division
Department of Justice
1100 L Street, N.W.
Washington, DC 20530

and

SOLICITOR GENERAL OF
THE UNITED STATES
Department of Justice
Room 5614
950 Pennsylvania
Avenue, N.W.
Washington, DC 20530-
0001

RESPONDENTS

48pp

QUESTIONS PRESENTED FOR REVIEW

1. Whether the respondent's failure to grant the petitioner, a reemployed annuitant, a waiver of salary offset under 5 U.S.C. 8344 (i) (1) was a violation of the petitioner's due process rights under the 5th Amendment of the United States Constitution?

2. If not, whether the petitioner was a full-time employee from June 1, 1993 to June 5, 1997; entitling him to an augmented retirement annuity, increased life insurance benefits, and all other benefits to which a full-time employee would have been entitled; and

3. Whether the respondent's method of computing the offset under 5 U.S.C. 8344(a) was proper in that it failed to take into account that a portion of the annuity being used for salary offset purposes was, in reality, a return of the petitioner's own contribution to the Civil Service Retirement fund which resulted in an improper reduction in his salary for the four (4) years in question?

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PARTIES' DISCLOSURE STATEMENT

The petitioner, Rodney G. Haworth, has no interest which would adversely affect his ability to file this Petition for a Writ of Certiorari.

OPINIONS BELOW

The decision of the United States Court of Appeals for the Federal Circuit dated May 8, 2001, is not reported but is reproduced in the Appendix beginning at page App. 5. The Court thereafter denied petitions for a rehearing and a rehearing en banc on June 14, 2001, and such ORDER is reproduced in the Appendix at pages 3 and 4.

The FINAL ORDER of the Merit Systems Protection Board is reproduced in the Appendix beginning at page App. 15.

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. section 1251 (1).

STATUTORY AND CONSTITUTIONAL PROVISIONS INVOLVED

The following statutory sections and constitutional provisions are reproduced in this petition: 5 U.S.C. 8344 (a), 5 U.S.C. 8344 (i) (1), and the 5th Amendment of the United States Constitution

REASONS FOR WRIT OF CERTIORARI TO BE GRANTED

1. The United States Court of Appeals for the Federal Circuit failed to consider or take into account its own precedent decisions and that of its predecessor, the Court of Claims.

2. The United States Court of Appeals for the Federal Circuit failed to consider the constitutional question raised by the petitioner.

3. The United States Court of Appeals for the Federal Circuit failed to consider the petitioner's contention that he was underpaid during his reemployment from June 1, 1993, to June 5, 1997, by virtue of the computation used in offsetting his salary which did not take into account that a portion of the annuity used in the offset was, in reality, a return of the petitioner's own contribution to the Civil Service Retirement fund.

STATEMENT OF THE CASE

Having been docketed for assignment on May 7,

2001, in the United States Court of Appeals for the Federal Circuit (hereinafter referred to as the Appellant Court) in the matter of Haworth v. OPM, case No. 01-3059, within a mere 24 hours that Court filed its opinion and entered judgment on May 8, 2001, which the petitioner herein requests be reviewed. A petition for rehearing en banc or at least a rehearing was subsequently filed with the Appellate Court which by order dated June 14, 2001, denied said requests. The Supreme Court has jurisdiction to review on a Writ of Certiorari such actions under 28 U.S.C. 1254 (1).

The facts on which this Writ is based are relatively simple. In that regard, the petitioner retired from Federal service on October 1, 1989, at which time he was 55 years of age and had over 30 years of creditable service. Following that, he began drawing a retirement annuity. Thereafter, he was reemployed by the respondent in the same job previously held ie., as an Administrative Law Judge (hereinafter referred to as ALJ) for the Social Security Administration from June 1, 1993, to June 5, 1997; a period of four (4) years. It was on the latter date that the petitioner terminated his employment though the res-

pondent continued to renew his employment for, at least, a year thereafter. In its notices of personnel action (SF 50s) concerning the reemployment, the respondent indicated that such was "due to workload imbalances". During that period, however, the petitioner's scheduled salary was offset by the respondent under 5 U.S.C. 8344 by the amount of civil service retirement he was then receiving. Thus, he received a salary, during the four years in question, which was only about 50% of the otherwise scheduled salary of an ALJ.

In its computation of the offset and insofar as the petitioner has been able to ascertain, the respondent failed to take into account the fact that a portion of his retirement annuity, ie., $2,850.36 per year, represented a return of his own contribution to the Civil Service Retirement fund. Accordingly, the petitioner's salary was additionally reduced by that amount each year, and, in turn, he was underpaid that amount in salary each of the four (4) years. The respondent has not contested, heretofore, that such was an improper reduction, but the Appellate Court ignored it as an issue.

In his Request for Discovery on March 27, 2000, the petitioner asked, among other things, that the respondent provide "Weekly or Bi-weekly, as the case may be, time records for the hours, days, and weeks worked; all records of time spent on official travel; all records of salary amounts actually paid to the Appellant (petitioner); all records of civil service retirement benefits paid to the Appellant; and a computation of the offset applied by the Agency (respondent) in computing the Appellant's actual pay." In its response of April 12, 2000, the respondent replied: "OPM does not have this information."

Despite the petitioner's inability to obtain pertinent evidence from the respondent, the record nonetheless shows that from June 1, 1993, to December 31, 1993, the petitioner was paid wages by the Social Security Administration in the total amount of $25,465. 12. His gross annuity for that year was $42,612; 7-12ths of which would be $24,857 for the same period. Those two amounts together total $50,322 and such is the actual figure which reflects time spent on the job by the petitioner during those seven (7) months. The two figures, salary paid and annuity earned, must be

added together since, in effect, the offset provision of 5 U.S.C. 8344 would provide for no salary whatsoever until all of the annuity is absorbed by work. In addition, a statement dated March 30, 1994, was submitted from Marcia Green, timekeeper, which further shows that the petitioner was engaged in out-of-town work-related business for about ten (10) weeks just during the latter seven (7) months of 1993.

For 1994, the petitioner's scheduled salary as a full-time ALJ would have been $96,466. That same year, wages were shown to have been paid in the amount of $48,011.84 and the annuity paid was $43,440. Again recognizing that the petitioner was not paid a salary, per se, under the offset provisions until all of the yearly annuity had been absorbed by work activity performed, those two amounts total $91,452 or about 95% of the total of $96,466 which the petitioner could have been paid. The difference is, for the most part, due to national holidays when no one worked and for which the petitioner was not paid. A statement from the hearing office Chief Judge reflects that the petitioner worked 76 days out of town and 176 days in town during 1994 for a total of 252 days. Considering

that a year contains 365 days of which 104 relate to non-work-day weekends and nine (9) to national holidays, it is abundently clear that the petitioner worked full-time in 1994.

The holds true for 1995, 1996, and through May of 1997 when the petitioner ceased working on June 5, 1997. As of 1995, the record shows that the total salary of an ALJ was $97,493. For that year, the petitioner was paid gross wages, after offset, of $48,220.64 and a gross annuity of $44,634. Together, they total $92,855 or 95% of the total salary which could have been earned by a full-time ALJ that year; the difference, again, being due to national holidays for which the petitioner was not paid. Also of record is a statement from Lynn Sparks, timekeeper, which shows 16 out-of-town work trips by the petitioner in 1995.

Effective January 7, 1996, the petitioner's pay, had he been considered a full-time employee, was in-increased to $97,993. The record shows wages actually paid to him that year in the amount of $49,440.09 and a gross annuity of $45,813 for a total of $95,253 or 97% of the wages of a full-time ALJ that year. Once

again, the difference is attributable to national holidays for which the petitioner was not paid.

Effective March 30, 1997, the salary of a full-time ALJ was increased to $98,808 per year or to approximately $44,170 for the five (5) months the petitioner was employed in 1997. For that year, he received a gross annuity of $47,436; 5-12ths of which would be $19,765. Wages paid were in the amount of $17,604.80. Combined, those amounts total $37,369.80 and represent 91% of what could have been earned by an ALJ during those five (5) months. The percentage becomes even higher if national holidays are taken into account. During that same period, the record also shows that the petitioner was in official travel status 23 days and at work in Cincinnati for 56 days.

Although unable to respond appropriately to the petitioner's Request for Discovery, the respondent has now agreed that the petitioner worked 7,258 hours from June of 1993, to June of 1997, or an average of 1,814.50 hours per year. This translates into 45.36 weeks per year or 87% of a 52 week year. Again, the percentage becomes higher if national holidays are taken into account.

PETITIONER'S ARGUMENTS FOR GRANTING WRIT

Initially, it is the petitioner's contention that he was, in substance, a full-time employee during the four (4) years in question. Respondent has contended that to have been full-time, the petitioner must have worked 2080 hours per year (52 weeks x 40 hours per week). Such position is, of course, untenable in that it fails to recognize national holidays which would reduce their total to 2008. It further fails to recognize that a full-time employee with 15 years of service or more is granted 26 days or 208 hours per year in annual (vacation) leave and 13 days or 104 hours of sick leave, and that federal employees were furloughed for 3 days in 1996.

In its decision of May 8, 2001, the Appellate Court ignored its own precedents and merely concluded that based on form alone ie., Standard Form (SF) 50s which indicated that the petitioner had been appointed to a series of intermittent positions, that he was not a full-time employee and, thus, not entitled to a supplemental annuity or an increase in his life insurance benefits.

Interestingly, the Appellate Court has attempted

to pull itself up by its own boot straps by concluding that the petitioner was merely an intermittent employee by which it avoided making an analysis of the substantative facts. Having based its conclusion on form alone, then it necessarily followed, in that Court's opinion, that the petitioner's payroll and time records are not relevant. That has never been a position taken even by the respondent. In fact, the administrative judge considered such records, albeit incorrectly, and the petitioner reconstructed such records as best he could from salary and annuity records when the respondent replied to the Request for Discovery that it had no information in that regard. Those records or reasonable substitutes, as the petitioner submitted, are clearly relevant in determining whether one is, in substance, an intermittent or a full or part-time employee. The Appellate Court dodged that question by relying solely upon form and that was in error.

It has, of course, been held that substance supercedes form and that principle is not limited only to when it benefits the Government. Frelbro Corporation v. Commissioner, 315 F2d 784 (2nd Cir.,

1993). In connection with the present case, the Appellate Court noted but rejected the rationale in Dove v. United States 161 Ct. Cl. 768 (1963) with the statement that:

> "... at issue in Dove expressly invited an inquiry into whether the intermittent employee served as a full-time employee, and to authorize retirement credit for such service for purposes of calculating an initial retirement annuity (as opposed to a supplemental annuity),"

In Dove, the employee had worked over 90% of the time during a six (6) year period. The petitioner submits there is no viable distinction as to whether an initial retirement annuity is involved or a supplemental annuity; the rationale being the same and dependent on substance versus form.

In a more recent case, to which the Appellate Court did not refer, it was concluded that an individual who had worked from six to just over eight months a year was not full-time. Bain v. OPM, 978 F2d 1227 (Fed. Cir., 1992). Under the facts of that case, the petitioner would agree. The Appellate Court in Bain, nonetheless, re-affirmed the rationale in Dove, supra, ie., that substance prevails over form, and stated:

"In determining a Federal employee's employ-

> ment status, Dove clarifies that the actual conditions of the worker's employment takes precedent over administrative labels."

Thus, even though the petitioner was classified as "intermittent" on the SF 50s, the reality or substance of his employment should have been considered by the Appellate Court. There was no analysis by the Appellate Court in that regard, and it was erroneous in not following its own precedents. Had it done so, the petitioner should have been found to have been a full-time employee. The record clearly shows that he worked well over 90% of the time that was available each year.

In what appears to be somewhat of an aside, the Appellate Court cited United States v. Testan, 424 U. S. 392 (1976) in support of its position. The Bain decision, however, was entered well after that and did not preclude the Court in Bain from considering the realities of the situation ie., substance v. form, something which the Appellate Court has failed to do in this instance.

The Appellate Court also ignored the petitioner's contention that he was underpaid each of the four (4)

years in question by virtue of the offset computation which did not take into account that his retirement annuity contained a portion of his own contribution to the retirement fund and should not have been taken into account in reducing his salary. This has been raised as an issue throughout, but was completely ignored by the Appellate Court. As a matter of fact, each reviewing body to this point has been completely oblivious to such issue. Whereas it was held in Shelleman v. U.S., 9 Ct. Cl. 452 (1986) that the Court of Claims had no subject matter jurisdiction over the method of computing back pay, the Court went on to state that any such determination by the Merit Systems Protection Board is appealable to the Federal Circuit. Again, the Appellate Court failed to recognize its own predecessor's opinion and refused to assume jurisdiction over this question. Likewise, the Merit Systems Protection Board also failed to consider the issue, though raised, and both it and the Appellate Court had subject matter jurisdiction.

Finally, the petitioner questions whether any offset under 5 U.S.C. 8344 should have been made against his salary during the period of his re-

employment. 5 U.S.C. 8344(a) provides as follows:

"(a) If an annuitant receiving annuity from the fund, except-

(1) a disability annuitant whose annuity is terminated because of his recovery or restoration of earning capacity;

(2) an annuitant whose annuity, based on an involuntary separation (other than an automatic separation or an involuntary separation for cause on charges of misconduct or delinquency), is terminated under subsection (b) of this section;

(3) an annuitant whose annuity is terminated under subsection (c) of this section;or

(4) a Member (defined as a member of congress, Sec. 8331 (2)) receiving annuity from the fund;

becomes employed in an appointive or elective position, his service on and after the date he is so employed is covered by this subchapter. Deductions for the fund may not be withheld from his pay unless the individual elects to have such deductions withheld under subparagraph (A). An amount equal to the annuity allocable to the period of actual employment shall be deducted from his pay, except for lump-sum leave payment purposes under section 5551 of this title. The amounts so deducted shall be deposited in the Treasury of the United States to the credit of the fund. If the annuitant serves on a full-time basis, except as President, for at least 1 year, or on a part-time basis for periods equivalent to at least 1 year of full-time service, in employment not excluding him from coverage under section 8331 (1)(i) or (ii) of this title-

(A) deductions for the Fund may be withheld from his pay (if the employee so elects) and his annuity on termination of employment is increased by an annuity

> computed under section 8339 (a), (b), (d) (e), (h), (i), (n), (q), and (r) as may apply based on the period of employment and the basic pay, before deduction, averages during that employment; and
> (B) his lump-sum credit may not be reduced by annuity paid during that employment. (Emphasis added)

> "if the annuitant is receiving a reduced annuity as provided in sectio 8339 (j) or section 8339 (K) (2) of this title, the increase in annuity payable under subparagraph (A) of this subsection is reduced by 10 percent and the survivor annuity payable under section 8341 (b) of this title is increased by 55 percent on the increase in annuity payable under subparagraph (A), unless, at the time of claiming the increase payable under such subparagraph (A), the annuitant notifies the Office of Personnel Management in writing that he does not desire the survivor annuity to be increased...."

At the very least, the petitioner should be entitled to a supplemental annuity as prescribed by 5 U.S.C. 8344 (a), supra

In addition, 5 U.S.C. 8344 (i) (1) further provides:

> "(i)(1) The Director of the Office of Personnel Management may, at the request of the head of an Executive agency-
>
> (A) waive the application of the preceding provisions of this section on a case by case basis for employees in positions for which there is exceptional difficulty in recruiting or retaining a qualified employee; or (B) grant authority to the head of such agency to waive the application

> of the preceding provisions of this section, on a case by case basis, but only if, and for so long as, the authority is necessary due to an emergency involving a direct threat to life or property or other unusual circumstances." (Emphasis added)

Recognizing that the petitioner's reemployment was based on "workload imbalances" gave the respondent the authority under 5 U.S.C. 8344(i)(1), supra, to waive the application of the offset provisions of 5 U.S.C. 8344(a), supra, due to "other unusual circumstances." Not to have done so was a violation of the petitioner's due process rights under the 5th Amendment of the U.S. Constitution in that workload imbalances would clearly seem to be an "other unusual circumstance." Whereas the petitioner recognizes that these may be legitimate governmental classifications, allowing the respondent or an agency to apply them in "other unusual circumstances" allows the respondent to arbitiarily pick and choose the employees to whom they will grant a waiver and that is a due process violation. Logan v. Zimmerman Brush Co., 12 S. Ct. 1148 (1982).

The 5th Amendment states:

> "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand

> Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself; nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation." (Emphasis added)

CONCLUSION

In summary, the Appellate Court should be bound to follow its own precedents and the precedents of its predecessor, and analyze the substance of the petitioner's reemployment. In that event, it should have concluded the petitioner was a full-time employee from June 1, 1993 to June 5, 1997, and that his salary, as paid, was improperly reduced by the amount of his contribution into the civil service retirement fund. It was also improper for the respondent not to waive the applicability of 5 U.S.C. 8344(a) and such violated the petitioner's due process rights. Therefore, the petitioner should have been entitled to a full salary, undiminished by offset, and any other benefits to which a full-time employee would have been entitled. If not, it should still be concluded that the petitioner was a full-time employee entitled to have his-

retirement annuity and life insurance benefits adjusted-augmented based on the four (4) years of his reemployment. Additionally, he should be entitled to back pay in the amount of $2,850.36 for each of the four (4) years when his salary was reduced by that amount which, in reality, was merely a return of his own contribution to the civil service retirement fund.

For all of the above reasons, the petitioner prays that this Petition for Writ of Certiorari be granted.

Respectfully submitted

Rodney G. Haworth

RODNEY G. HAWORTH, Pro Se
Petitioner

IN THE SUPREME COURT OF THE UNITED STATES

RODNEY G. HAWORTH

Petitioner

v.

OPM

Respondent

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

APPENDIX TO PETITION FOR WRIT OF CERTIORARI

RODNEY G. HAWORTH, Pro Se
5896 Countryhill Drive
Cincinnati, Ohio 45233
(513) 922-0804

PETITIONER

JAN M. FOLENA
Commercial Litigation Branch
Civil Division
Department of Justice
1100 L Street, N.W.
Washington, DC 20530

and

SOLICITOR GENERAL OF THE UNITED STATES
Department of Justice, Room 5614
950 Pennsylvania Avenue, N.W.
Washington, DC 20530-0001

RESPONDENTS

APPENDIX

Contents:

Exhibit A: Order of June 14, 2001, by the United States Court of Appeals for the Federal Circuit regarding Petition for Rehearing En Banc or Rehearing.

Exhibit B: Judgment of the United States Court of Appeals for the Federal Circuit entered as a Mandate on June 29, 2001.

Exhibit C: Final Order of the United States Merit Systems Protection Board dated November 8, 2000.

Exhibit A

UNITED STATES COURT OF APPEALS FOR THE FEDERAL COURT

01-3059

RODNEY G. HAWORTH,

Petitioner,

OFFICE OF PERSONNEL MANAGEMENT,

Respondent.

ORDER

United States Court of Appeals for the Federal Circuit

ORDER

A petition for rehearing en banc having been filed by the PETITIONER, and the matter having first been referred as a petition for rehearing to the panel that heard the appeal, and thereafter the petition for rehearing en banc having been referred to the circuit judges who are in regular active service,

UPON CONSIDERATION THEREOF, it is

ORDERED that the petition for rehearing be, and the same hereby is, DENIED and it is further

ORDERED that the petition for rehearing en banc be, and the same hereby is, DENIED.

The mandate of the court will issue on June 29, 2001.

FOR THE COURT,

/s/ JAN HORBALY
Jan Horbaly
Clerk

Dated: June 14, 2001

cc: Rodney G. Haworth
Jan M. Folena

HAWORTH V. OPM, 01-3059
(MSPB-CH0831000384-I-1)

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Note: Pursuant to Fed. Cir. R. 47.6, this order is not citable as precedent. It is a public record

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Exhibit B

United States Court of Appeals for the Federal Circuit

01-3059

RODNEY G. HAWORTH,

Petitioner,

OFFICE OF PERSONNEL MANAGEMENT,

Respondent,

JUDGMENT

Petition for review of the Merit Systems Protection Board in CH0831000384-I-1.

This CAUSE having been heard and considered, it is ORDERED and ADJUDGED:

AFFIRMED.

ENTERED BY ORDER OF THE COURT

DATED: May 8, 2001

/s/ JAN HORBALY/kn
Jan Horbaly
Clerk

ISSUED AS A MANDATE: June 29, 2001

NOTE: Pursuant to Fed. Cir. R. 47.6, this disposition is not citable as precedent. It is a public record. This disposition will appear in tables published periodically.

United States Court of Appeals for the Federal Circuit

01-3059

RODNEY G. HAWORTH,

Petitioner,

OFFICE OF PERSONNEL MANAGEMENT,

Respondent,

DECIDED: May 8, 2001

Before LOURIE, BRYSON, and LINN, Circuit Judges.
PER CUIAM.

DECISION

Rodney Haworth appeals from an order of the Merit Systems Protection Board, in which the Board upheld the decision of the Office of Personnel Management (OPM) denying his request for a supplemental retirement annuity and an increased life insurance benefit based on four years of reemployment service. Because Mr. Haworth was an intermittent employee during the four-year period of his

reemployment service and because intermittent employees are excluded from retirement coverage, we affirm.

BACKGROUND

Mr. Haworth retired from his position as an Administrative Law Judge with the Social Security Administration (SSA) in October 1989 after 30 years of federal service. Since his retirement, Mr. Haworth has received a retirement annuity without interruption. On June 1, 1993, Mr. Haworth was reemployed by SSA as a Senior Administrative Law Judge. Mr. Haworth's appointment was to an intermittent position, i.e., a non-full-time position without a prescheduled regular tour of duty. 5 C.F.R. § 837.102. As the position was a temporary position created "due to workload imbalances," the appointment was limited to one year or less. However, Mr. Haworth was reappointed to the same position annually until his termination on May 31, 1998. Mr. Haworth was notified that each of his appointments was an intermittent appointment. He was also notified that he was ineligible for leave and that his annual salary was to be reduced by the amount of his retirement annuity.

Following his termination, Mr. Haworth applied to OPM for a supplemental retirement annuity and for an

increased life insurance benefit based on his reemployment service from June 1, 1993, to June 5, 1997. OPM denied his application, stating that because intermittent or WAE ("when actually employed") employment is not full-time or part-time service, it is not creditable for purposes of establishing a supplemental annuity or an increased life insurance benefit. Mr. Haworth sought reconsideration, arguing that he actually worked on a full-time (or at minimum, a part-time) basis. Mr. Haworth also raised new claims that he had been improperly classified as an intermittent employee, that for that reason his pay should not have been reduced by the amount of his retirement annuity, and that he should have been awarded credit for leave and federal holidays. OPM affirmed its initial denial, citing 5 C.F.R. § 837.503 and reiterating that "[b]ecause your reemployment was all intermittent service, it is not creditable for a supplemental annuity." OPM did not address Mr. Haworth's new claims.

Mr. Haworth appealed to the Board. In an initial decision, the administrative judge first noted that Mr. Haworth's new claims - that SSA had improperly classified him as an intermittent employee, that it had improperly failed to compensate him for leave and holidays, and that it

had improperly offset his salary by the amount of his retirement annuity -- were not properly before the Board. The administrative judge then concluded that Mr. Haworth had failed to show by a preponderance of evidence that he was entitled to the supplemental retirement annuity. Applying 5 C.F.R. § 837.503, the administrative judge found that Mr. Haworth was not eligible for an increased annuity or life insurance benefits because he had not shown that his employment at any time during the four-year period of his intermittent service was equivalent to one year of actual, continuous, full-time service. The full Board denied Mr. Haworth's petition for review of the initial decision, which therefore became the decision of the Board.

DISCUSSION

Mr. Haworth contends that OPM's denial of his application was arbitrary and capricious because OPM did not have access to his payroll and time records. However, Mr. Haworth did not submit his payroll and time records to OPM for its consideration. Moreover, those records were not relevant to his application for a supplemental annuity and increased life insurance benefit. Such benefits are not generally available to intermittent employees, regardless of

the total number of hours they actually work. See 5 U.S.C. § 9347(g); 5 C.F.R. § 831.201(a)(2). OPM (and the Board) had access to the most relevant evidence, Mr. Haworth's Standard Form (SF) 50s, which indicated that he had been appointed to a series of intermittent positions beginning June 1, 1993, and ending May 31, 1998. As an intermittent employee, Mr. Haworth was not entitled to supplemental annuity or increased life insurance benefit.

The specific regulation governing supplemental annuities confirms that reemployed annuitants who serve as intermittent employees do not qualify for this benefit:

> (a) A reemployed annuitant is entitled, on separation, or conversion to intermittent service, to a supplemental annuity if - -
>
> (1) the annuitant performed - -
>
> (i) At least 1 year of actual, continuous, full-time service;
> (ii) Actual, continuous part-time service equivalent to 1 year of actual full-time service; or
> (iii) A combination of part-time and full-time actual, continuous service that is equivalent to 1 year of actual full-time service; . . .

5 C.F.R. § 837.503. This provision makes clear that a reemployed annuitant cannot earn a supplemental annuity

based on intermittent service since the service that entitles an employee to a supplemental annuity ends "on separation or conversion to intermittent service." See also 5 U.S.C. § 8468(a) & (b)(1)(A) (exempting reemployed annuitants whose "appointment is on an intermittent basis" from pay deductions for the retirement fund and providing that only reemployed annuitants who are "subject to deductions" qualify for an increased annuity based on the period of reemployment). In addition, "actual service" is defined as "the period of time during which an annuitant is reemployed, excluding periods of separation and non-pay status," 5 C.F.R. § 837.102, and "continuous service" is defined as "reemployment without a period of separation from service, or conversion to intermittent status, of more than 3 days," 5 C.F.R. § 837.102 (emphasis added). Thus, intermittent service may be "actual service," but it is not "continuous service." Both actual and continuous service are necessary to qualify for a supplemental annuity. Finally, the regulations clearly distinguish full-time and part-time service from intermittent service on the ground that intermittent service does not involve a prescheduled regular tour of duty. Thus, equating full-time service or

part-time service with intermittent service would be inconsistent with the regulatory framework.

Alternatively, Mr. Haworth contends that OPM should have looked behind his intermittent appointment to determine whether he was in fact a full-time or part-time employee for purposes of calculating any supplemental annuity. Mr. Haworth relies on Dove v. United States, 161 Ct. Cl. 768 (1963), for this proposition. However, the regulation at issue in Dove expressly invited an inquiry into whether the intermittent employee served as a full-time employee, and it authorized retirement credit for such service for purposes of calculating an initial retirement annuity (as opposed to a supplemental annuity). Because the Civil Service Commission (OPM's predecessor) had failed to follow its own regulations, the Court of Claims held that the intermittent employee was entitled to retirement credit as if he had been a full-time employee during the relevant period. Mr. Haworth can point to no regulation inviting a similar inquiry in this case. In fact, as we have noted, the regulations pertinent to calculating a supplemental annuity expressly or implicitly exclude intermittent employees. See 5 C.F.R. §§ 831.201(a)(2) & 837.503. Moreover, the usual rule in federal employment

law is that "one is not entitled to the benefit of a position until he has been duly appointed to it." United States v. Testan, 424 U.S. 392, 402 (1976). Mr. Haworth was not appointed to a full-time or part-time position; he was appointed to an intermittent position, and therefore he is not entitled to the benefits of a full-time or part-time position. For the same reason, we reject Mr. Haworth's claim that, because he was improperly classified as an intermittent employee, he is owed back pay for leave and holidays during the period of his employment.

Finally, Mr. Haworth challenges the provision requiring that his salary be offset by an amount equal to the annuity allocable to the period of his actual employment. See 5 U.S. C. § 8344. This issue is not properly before the Board. The Board has jurisdiction to hear Mr. Haworth's appeal only because OPM's determination that Mr. Haworth was not entitled to a supplemental annuity or increased life insurance benefit affected Mr. Haworth's rights or interests under the Civil Service Retirement System. See 5 U.S.C. § 8347(d); 5 C.F.R. § 1201.3(a)(6). Mr. Haworth's challenge to the offset provision does not affect Mr. Haworth's rights or interests under the Civil Service Retirement System. Mr.

Haworth is not contending that he did not receive his annuity during the relevant time frame or that the amount of his annuity was somehow miscalculated. The Board therefore correctly ruled that it lacked jurisdiction to consider this argument.

Exhibit C

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

DOCKET NUMBER CH-0831-00-0384-I-1

RODNEY G. HAWORTH

Appellant,

v.

OFFICE OF PERSONNEL
DATE: Nov 8 2000

MANAGEMENT

Agency.

(CSA 3 174 711)

Rodney G. Haworth, Cincinnati, Ohio, pro se

John Panagakos, Washington, D.C., for the agency.

BEFORE

Beth S. Slavet, Acting Chairman
Susanne T. Marshall, Member

FINAL ORDER

The appellant has filed a petition for review in this case asking us to reconsider the initial decision issued by the administrative judge. We grant petitions such as this one only when significant new evidence is presented to us that was not available for consideration

earlier or when the administrative judge made an error interpreting a law or regulation. The regulation that establishes this standard of review is found in Title 5 of the Code of Federal Regulations, section 1201.115 (5 C.F.R. Sec. 1201.115).

After fully considering the fillings in this appeal, we conclude that there is no new, previously unavailable, evidence and that the administrative judge made no error in law or regulation that affects the outcome. 5 C.F.R. Sec. 1201.115(d). Therefore, we DENY the petition for review. We note that the appellant may request from the Office of Personnel Management a refund without interest of any retirement deduction withheld from his pay during the period of his reemployment. 5 C.F.R. Sec. 837.501. The initial decision of the administrative judge is final. This is the Board's final decision in this matter. 5 C.F.R. Sec. 1201.113.

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FOR THE BOARD S Robert E. Taylor
Clerk of the Board
Washington, D.C.

Exhibit D
UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD
CENTRAL REGIONAL OFFICE

RODNEY G. HAWORTH Appellant, v. OFFICE OF PERSONNEL MANAGEMENT, Agency (CSA 3 174 711)	DOCKET NUMBER CH-0831-00-0384-I-1 DATE: July 31, 2000

Rodney G. Haworth, Cincinnati, Ohio, pro se.

Ernest Hammond, Washington, DC, for the agency.

BEFORE

Nina Puglia
Administrative Judge

INITIAL DECISION

INTRODUCTION

On March 6, 2000, the Office of Personnel Management (OPM) issued a final reconsideration decision finding the appellant was not entitled to supplemental Civil Service Retirement System annuity benefits based on his reemployment. The appellant appealed that decision to the Board on March 14, 2000. The Board has jurisdiction over the appellant's timely appeal. *See* 5 U.S.C.A. § 8347(d)

(West 1996). The appellant did not request a hearing and this case is decided on the written record.

For the reasons stated below, OPM's reconsideration decision is AFFIRMED.

ANALYSIS AND FINDINGS

The appellant retired on October 1, 1989, from his position as an Administrative Law Judge for the Social Security Administration (SSA). On June 1, 1993, SSA appointed him to an "intermittent temporary position not-to-exceed one year" as a Senior Administrative Law Judge at its Office of Hearings and Appeals. Because the appellant was a reemployed annuitant, his salary ($92,560.00) was offset by the annuity he was already receiving. *See* Agency File, Tab 6, p. 26.

On August 4, 1995, the appellant wrote to OPM asking that his reemployment service be included in calculating his annuity. *See* Agency File, Tab 6, p. 25. On October 4, 1995, OPM sent the appellant an application for a supplemental annuity. The application contained portions to be completed by SSA and required SSA to submit the appellant's Individual Retirement Record (Standard Form 2806). *See* Agency File, Tab 6, p. 24.

On August 31, 1998, OPM informed the appellant he must contact his employing agency for information and assistance in filing an application. *See* Agency File, Tab 6,

p. 24. On September 16, 1998, the appellant filed his application for a supplemental annuity, seeking service credit for his reemployment with SSA from June 1, 1993 to June 5, 1997. *See* Agency File, Tab 6, p.22. A Standard Form (SF) 50 submitted with his application shows he was employed under an "intermittent" work schedule starting June 7, 1993, and not-to-exceed May 31, 1994. The SF-50 stated his CSRS service was "frozen" and he would receive "none" for this period of employment. *See* Agency File, Tab 6, p.6. This document also states the appellant was ineligible to accrue leave in his intermittent position. Another SF-50 shows the appellant's position was converted, effective June 1, 1995, to a second intermittent appointment not to exceed May 31, 1996. *See* Agency File, Tab 6, p. 10. A third SF-50 shows the appellant was converted to a third intermittent appointment, not to exceed May 31, 1997. *See* Agency File, Tab 6, p. 14. A fourth SF-50 shows the appellant's intermittent appointment was converted to a fourth and final intermittent appointment June 1, 1997. Each of these appointments stated the appellant was not eligible to accrue leave based on the appointment and that each appointment was not to exceed one-year. *See* Agency File, Tab 6, p. 16. On May 31, 1998, the appellant's final intermittent position expired and was not renewed. *See* Agency File, Tab 6, p. 18.

On September 16, 1998, OPM denied the appellant's request to recalculate his annuity based on his reemployment with SSA. *See* Agency File, Tab 4. According to OPM, intermittent employment such as the appellant's is not creditable for recomputation of a supplemental annuity. OPM also denied the appellant's request for new life insurance based on the intermittent employment.

The appellant requested reconsideration, asking OPM to factor into its decision the fact that he earned no leave during his reemployment and thus worked more hours than full-time employees. *See* Agency File, Tab 3. He also asked OPM to consider the argument that SSA improperly classified him as an intermittent employee. He further requested that he be compensated for the sick leave, annual leave, and holiday pay he believes he should have received and that he be reimbursed for the portion of his salary SSA offset by his annuity.

On March 6, 2000, OPM issued a reconsideration decision affirming its decision to deny him a supplemental annuity. OPM did not address the appellant's request that OPM reclassify his 1993-1997 work for SSA as something other than intermittent, his request for sick leave, annual leave, and holiday pay, or his request that his salary be retroactively increased by the amount offset by his annuity.

See Agency File, Tab 2.[1] The appellant now challenges OPM's reconsideration decision before the Board.

To prevail in his appeal, he appellant must show that he is entitled to the retirement annuity he seeks by a preponderance of the evidence. *Cloutier v. Office of Personnel Management*, 60 M.S.P.R. 586, 588 (1994). The applicable regulations state the following: A reemployed annuitant is entitled, on separation, or conversion to intermittent service, to a supplemental annuity if . . . [he] performed --

(i) At least one year of actual, continuous, full-time service;

(ii) Actual, continuous, part-time service equivalent to 1 year of actual full-time service; or

(iii) A combination of part-time and full-time service equivalent to 1 year of actual, continuous service that is equivalent to 1 year of actual full-time service . . . . 5 C.F.R. § 837.503(a) (2000).

The appellant has not shown specifically whether he performed full-time, part-time, or a combination of full-time and part-time service that is equivalent to one year of actual, continuous, full-time service. He has only shown

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[1] Several issues raised by the appellant are not properly before the Board. They concern his assertions that SSA improperly classified him as an intermittent employee, that SSA improperly failed to compensate him for the sick leave, annual leave, and holiday pay, and that SSA improperly offset his salary by the amount of his pension.

that he earned more than the base annual salary of his intermittent Senior Administrative Law Judge position, $92,560.00, by earning at least $155,742.33 during a three and one-half year period -- from June 1, 1993 through December 31, 1996. *See* Agency File, Tab 8 and Agency File, Tab 6, p. 26. The appellant submitted copies of his W-2 forms from 1993, showing he was paid $25,465.12 by the Department of Health & Human Services that year; 1994, showing he was paid $48,011.84 by the Department of Health & Human Services that year; 1995, showing he was paid $32,825.28 by SSA that year; and 1996, showing he made $49,440.09 working for SSA that year. *See* Appeal File, Tab 8.

OPM offered into the record a note from "Marti" at the Department of the Interior's National Business Center Payroll Operations Division and some unidentified charts. Although Marti states that "no hours were worked 1996 and 1997," she does not expressly reference the appellant. *See* Appeal File, Tab 13. The charts OPM provided at the same time as Marti's note bear the appellant's name, Social Security number and some other unidentified numbers. The agency's evidence, however, neither rebuts the information contained in the appellant's W-2 forms nor sheds any light on whether the appellant's intermittent service was equivalent to one year of actual, continuous, full-time service.

I find the appellant has shown he earned at least $155,742.33 during his reemployment by SSA from June 1, 1993 through December 31, 1996. I do not find, however, that he has shown that his employment at any time during that three and one-half year period was equivalent to one year of actual, continuous, full-time service. I find, therefore, that he has not met his burden of showing that he is entitled to supplemental Civil Service Retirement System annuity benefits based on his reemployment.

DECISION

OPM's reconsideration decision is AFFIRMED.

FOR THE BOARD: /s/ Nina Puglia
Nina Puglia
Administrative Judge

NOTICE TO APPELLANT

This initial decision will become final on **September 4, 2000**, unless a petition for review is filed by that date or the Board reopens the case on its own motion. This is an important date because it is usually the last day on which you can file a petition for review with the Board. However, if this initial decision is received by you more than 5 days after the date of issuance, you may file a petition for review within 30 days after the date you actually receive the initial decision. The date on which the initial decision becomes final also controls when you file a petition for review with the Court of Appeals for the Federal Circuit.

The paragraphs that follow tell you how and when to file with the Board or the federal court. These instructions are important because if you wish to file a petition, you must file it within the proper time period.

BOARD REVIEW

You may request Board review of this initial decision by filing a petition for review. Your petition, with supporting evidence and argument, must be filed with:

The Clerk of the Board
Merits Systems Protection Board
1120 Vermont Avenue, NW., Room 806
Washington, DC 20419

If you file a petition for review, the Board will obtain the record in your case from the administrative judge and you should not submit anything to the Board that is already part of the record. Your petition must be postmarked, faxed, or hand-delivered no later than the date this initial decision becomes final, or if this initial decision is received by you more than 5 days after the date of issuance, 30 days after the date you actually receive the initial decision. If you fail to provide a statement with your petition that you have either mailed, faxed, or hand-delivered a copy of your petition to the agency, your petition will be rejected and returned to you.

JUDICIAL REVIEW

If you are dissatisfied with the Board's final decision, you may file a petition with:

The United States Court of Appeal
for the Federal Circuit
717 Madison Place, NW
Washington, DC 20439

You may not file your petition with the court before this decision becomes final. To be timely, your petition must be received by the court no later than 60 calendar days after the date this initial decision becomes final.

NOTICE TO AGENCY/INTERVENOR

The agency or intervenor may file a petition for review of this initial decision in accordance with the Board's regulations.